Office-Supreme Court, U.S.
FILED
OCT 21 1966
JOHN F. DAVIS, CLERK

No. 345

IN THE

Supreme Court of the United States

RALPH T. HICKEY, FRANK J. GRAVES, RAYMOND J. HEIDERSCHEIDT, JOSEPH M. KEARNS and JAMES GRAVES
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondents.

PETITIONERS' REPLY

ALBERT E. JENNER, JR.
THOMAS P. SULLIVAN
HUGH M. KING
135 S. La Salle
Chicago, Illinois 60603

ROBERT J. LEALI
329 Lake
Woodstock, Illinois
Attorneys for petitioners

Of counsel:
RAYMOND, MAYER, JENNER & BLOCK
CARROLL, LEALI & GITLIN

UNITED STATES LAW PRINTING CO., CHICAGO 18, ILL. LAkeview 5-6581

INDEX

PAGE

I. The conspiracy charged and proved terminated in 1960 1

[Reply to Sol. Gen.'s Br., pp. 10-13]

II. The admissions of pre-conspiracy conversations as against non-participants violated the rule against admission of hearsay evidence 5

[Reply to Sol. Gen.'s Br., pp. 13-14]

III. The trial court in defining the charge of misapplication violated the principles established by this Court in *Stirone* v. *U. S.*, 361 U.S. 212 (1960) 7

[Reply to Sol. Gen.'s Br., pp. 14-15]

IV. Petitioners were denied their constitutional right to confront and cross-examine witnesses against them 8

[Reply to Sol. Gen.'s Br., pp. 15-17]

TABLE OF CASES

	PAGE
Brookhart v. Janis, 86 Sup. Ct. 1245 (1966)	9
Forman v. United States, 361 U.S. 416 (1960)	4
Grunewald v. U. S., 353 U.S. 391, 401-02 (1957)	3, 5
Krulewitch v. U. S., 336 U.S. 440, 443-444 (1949)	3, 5
Mount v. U. S., 333 F.2d 39 (5th Cir. 1964)	4
Pointer v. Texas, 380 U.S. 400 (1965)	9
Stirone v. United States, 361 U.S. 212 (1960)	7, 8
U. S. v. Britton, 107 U.S. 655, 669 (1882)	7
United States v. Dennis, 183 F.2d 201 (2d Cir. 1950)	6
United States v. Klein, 247 F.2d 908 (2d Cir. 1957)	4
United States v. Mesarosh, 223 F.2d 449 (3rd Cir. 1955)	6
United States v. Postma, 242 F.2d 488 (2d Cir. 1957)	6

IN THE

Supreme Court of the United States

No. 345

RALPH T. HICKEY, FRANK J. GRAVES, RAYMOND J. HEIDERSCHEIDT, JOSEPH M. KEARNS and JAMES GRAVES
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondents.

PETITIONERS' REPLY

I.

THE CONSPIRACY CHARGED AND PROVED TERMINATED IN 1960.

[Reply to Sol. Gen.'s Br., pp. 10-13.]

The Solicitor General concedes by implication that if petitioners are correct that the conspiracy as charged and proved ended in 1960, it was error for the trial court to admit as against all petitioners evidence of conversations between some of them which took place after 1960. The Court of Appeals also conceded this point. (App. 24.)

The Solicitor General, however, contends that the indictment in this case ". . . clearly charged, as within the conspiracy to misapply and participate in funds of Concord, acts of the Graves group occurring after the 1960 transfer of control." (Br., p. 10.)

The language of the indictment is a complete rebuttal to this inadvertent misstatement of the record. The indictment states that all of the defendants-petitioners conspired ". . . to defraud the Concord Savings and Loan Association . . . by having [all of the defendants] . . . willfully misapply money, funds and credits belonging to and entrusted to Concord Savings & Loan Association, and unlawfully and willfully participate, share in and indirectly receive moneys in the amount of approximately $250,000, which money represented a portion of the proceeds of Concord Savings & Loan Association loans numbered 4275 and 4276, ..." (A. 3-4.)

The accomplishment of the twofold objective of the conspiracy as charged constitutes the substantive allegations contained in Counts II and III of the indictment. Count II specifies that the willful misapplication involved the making of loans numbers 4275 and 4276 by Concord without receiving "sufficient collateral to secure the said alleged mortgage loans." (A. 6.) Count III is equally specific in stating that the unlawful participation involved the improper receipt by the defendants of the proceeds of loans 4275 and 4276. (A. 7-8.)

Both the crimes of willful misapplication and fraudulent participation as charged were complete on or about November 2, 1960. *The indictment does not allege that concealment of the misapplication and participation was a part of the original conspiracy, nor does it allege that concealment constituted an objective of a subsidiary conspiracy.* (See Sol. Gen's. Br., p. 10.)

The trial court, based upon inference arising from acts of covering up taking place after 1960, assumed the existence of an *uncharged,* subsidiary conspiracy to conceal the accomplishment of the central objective of the conspiracy charged in Count I of the indictment. Based upon this assumption, *the trial court erroneously instructed the jury to consider all post-1960 conversations against all defendants, whether participants or not.*

There was no evidence produced that the acts of covering up constituted part of the original plan. In fact, as the Solicitor General points out (Br., p. 11) it was the commencement of the F.B.I.'s investigation in 1961 which gave rise to efforts to "preserve appearances"—to cover up.

The process of inference and assumption employed by the trial court, and condoned by the Solicitor General, is precisely what this Court condemned in *Krulewitch* v. *U. S.* 336 U.S. 440, 443-444 (1949) and *Grunewald* v. *U. S.,* 353 U.S. 391, 401-402 (1957).

The Solicitor General begs the question raised by petitioners when he argues (Br., p. 12):

> "The fact that the particular method of covering was not within the contemplation of the parties when they first laid their plans does not render their acts outside the scope of the conspiracy *so long as the basis conspiracy was still in existence. Acts of concealment in furtherance of the main criminal objective are admissible evidence.*" (Emphasis added.)

The conversations here complained of took place *after* the conspiracy as charged had ended in the attainment of the central criminal objective, and not in furtherance of it.

The cases cited by the Solicitor General do not support the action of the trial court. The *Grunewald* case unequivocally supports petitioners' position (See Pet., pp. 15-

16, 19-21); and in the *Forman* and *Klein* cases the indictments expressly alleged that an objective of the conspiracy was concealment.

In *Mount* v. *U. S.*, 333 F.2d 39 (5th Cir. 1964) cert. denied 379 U.S. 900 (Sol. Gen's. Br., p. 12), the indictment alleged that the defendants agreed to counterfeit federal reserve notes and that they further agreed to " . . . buy. sell, transfer, receive and deliver counterfeit $100 federal reserve notes with the intent that they be passed, published, and used as genuine . . . " (333 F.2d at 40.) The Court of Appeals approved the admission of certain conversations as against non-participants (333 F.2d at 44):

> "The theory of appellants is that the conspiracy ended with the direction in the telephone conversation between Ellis and Ainsworth that the counterfeit money be burned, and that this telephone conversation as well as the subsequent conversations between Mount and Ellis were related to a separate conspiracy to destroy the counterfeit money, and thus were inadmissible in connection with the conspiracy charged. The long and the short of this stock argument is that these conversations all had to do with the conspiracy charged. The money was still in existence; trouble was near at hand, and care was being taken to avoid detection."

The *Mount* case is distinguishable from the case at bar because in *Mount* the conceded objective of the conspiracy as charged—the passing of the counterfeit notes with the intent that they be used as genuine—had not been fully achieved at the time of the conversations complained of by the appellants. In the instant case the central objective of the conspiracy as charged—the making of two inadequately secured loans and the unlawful participation in the proceeds thereof—was completely achieved in 1960.

To the extent that the *Mount* case is not distinguishable, it is directly inconsistent with the holding of this Court

in the *Grunewald* and *Krulewitch* cases (see Pet. pp. 21-22), and demonstrates the need for an exercise of this Court's discretionary review.

II.

THE ADMISSIONS OF PRE-CONSPIRACY CONVERSATIONS AS AGAINST NON-PARTICIPANTS VIOLATED THE RULE AGAINST ADMISSION OF HEARSAY EVIDENCE.

[Reply to Sol. Gen.'s Br., pp. 13-14]

The Solicitor General concedes that the conversations involved in the steps taken by Frank Graves to acquire Hartman Estates, took place prior to the commencement of the conspiracy. (Br., pp. 13-14.) It is argued, however, that evidence of these conversations was relevant and not in the nature of hearsay: "None of the testimony objected to was introduced to prove the truth of the matters stated, but merely served as background material essential to set the stage for the conspirators to effect their plan . . . ." (Br., p. 14.)

This is *the first time* that it has been argued by the government that the pre-conspiracy conversations were not in fact hearsay because not introduced to prove the truth of the matters stated. The argument is contradicted by the representations of the United States Attorney who sought the introduction of the evidence, and the Solicitor General's own brief (at p. 14). The evidence in question was introduced to prove the truth of the matters stated therein, namely, "The tenuousness of the control which Graves could exercise over the farm" and the "valuation placed upon the collateral" by the Graveses. (Sol. Gen's. Br., p. 14.)

Although it was unnecessary to place these prejudicial conversations before the jury for consideration as against

the participants (the same points could have been proved through documents), the admission of hearsay evidence as against non-participants clearly violated the principles announced by this Court and the holdings of various Courts of Appeals.

The three cases cited by the Solicitor General (Br., p. 14) support rather than contradict petitioners' argument:

(1) In *United States* v. *Postma*, 242 F. 2d 488 (2d Cir. 1957), the trial judge properly limited the pre-conspiracy evidence to the defendant involved, and did *not* admit the testimony as to defendants who later joined the conspiracy. (See 242 F.2d at 497.) That is the rule for which petitioners contend in this case.

(2) In *United States* v. *Dennis*, 183 F.2d 201 (2d Cir. 1950), aff'd on other grounds, 341 U.S. 494, the court concluded that late entrants into a conspiracy are held to adopt declarations of co-conspirators *which occurred during the existence of the conspiracy*. This conclusion assumes rather than decides the issue for which it is cited by the Solicitor General. That is, the conversations in the *Dennis* case took place during the existence of the conspiracy, whereas, in the case at bar, the conversations admittedly took place prior to the inception of the conspiracy charged.

(3) Similarly, in *United States* v. *Mesarosh*, 223 F.2d 449 (3rd Cir. 1955), the declarations admitted against non-participants were made *during the existence of the conspiracy* (223 F.2d at 455):

> "These acts and declarations which occurred before some of the appellants became members of the Party were admissible because when one joins an existing conspiracy knowing of the illegal objectives, he takes the conspiracy as it is, including prior acts and declarations by co-conspirators which are competent as evidence against him."

III.

THE TRIAL COURT IN DEFINING THE CHARGE OF MISAPPLICATION VIOLATED THE PRINCIPLES ESTABLISHED BY THIS COURT IN STIRONE V. U.S., 361 U.S. 212 (1960).

[Reply to Sol. Gen.'s Br., pp. 14 to 15.]

Contrary to Solicitor General's assertion (Br., p. 14), petitioners objected to the trial court's proposed instruction as to the meaning of "misapplication" charged in the indictment on the ground (inter alia) that neither concealment nor the making of a loan to a fictitious borrower were charged in the indictment. (A. 885-886.) This objection was overruled and was thereafter urged as error on appeal.

Petitioner's have previously demonstrated how this fundamental error infects the entire jury verdict. (Pet., pp. 27-28.)

The Solicitor General contends that the instruction served as an "explanaiton of a statutory term in light of the evidence presented." (Sol. Gen's. Br., p. 15.) This argument misconstrues the function of an indictment in a Section 657 case. A charge in the language of Section 657 is insufficient because the statutory terms contained therein have no settled technical meaning. The indictment in a Section 657 case must state how the alleged misapplication was accomplished; and that statement is binding upon the government. *U.S.* v. *Britton*, 107 U.S. 655, 669 (1882).

The indictment in the case at bar specifies that the misapplication consisted in defendant Hickey's making two specified loans, well-knowing that the association "did not receive sufficient collateral to secure" the loans. The trial court nevertheless directed the jury that, even if they failed to believe beyond a reasonable doubt that the two

loans had been made without sufficient security, they could nevertheless find defendants guilty of misapplication if they believed the two loans to have been concealed or made to a fictitious borrower.

Because of this direction, it is not now possible to determine conclusively whether or not the defendants were convicted on the charges which the grand jury specified in Count II of the indictment. This is precisely the situation which faced this Court in the *Stirone* case. As observed in *Stirone,* this uncertainty is violative of petitioners' Fifth Amendment right that the prosecution as begun by an indictment. (361 U.S. at 217, 219.)

IV.

PETITIONERS WERE DENIED THEIR CONSTITUTIONAL RIGHT TO CONFRONT AND CROSS-EXAMINE WITNESSES AGAINST THEM.

[Reply to Sol. Gen.'s Br., pp. 15-17.]

The Solicitor General has apparently micsonstrued petitioners' argument with respect to the right to cross-examination because in his brief in opposition he argues that since counsel for various defendants were afforded the opportunity to cross-examine all witnesses, whether or not the witnesses were testifying against their clients, it was purely a matter of discretion for the trial court whether or not counsel for defendants were to be permitted to cross-examine witnesses who did testify against their clients at the point in time when the witnesses became adverse to their clients. (Sol. Gen's. Br., p. 17.)

Petitioners contend, to the contrary, that cross-examination of government witnesses when those witnesses tes-

tified against particular defendants was a matter of constitutional right, and not a plea directed to the discretion of the trial court.

This Court has recently had occasion to reaffirm the absolute quality of the rights conferred by the Sixth Amendment in *Brookhart* v. *Janis*, 86 Sup. Ct. 1245 (1966), and *Pointer* v. *Texas*, 380 U.S. 400 (1965).

The fact that the procedure employed in this case may have become a practice in the Seventh Judicial Circuit in no way detracts from the clear violation of constitutional rights involved.

Respectfully submitted,

ALBERT E. JENNER, JR.
THOMAS P. SULLIVAN
HUGH M. KING
135 S. La Salle
Chicago, Illinois 60603

ROBERT J. LEALI
329 Lake
Woodstock, Illinois

Attorneys for petitioners

Of Counsel:
RAYMOND, MAYER, JENNER & BLOCK
CARROLL, LEALI & GITLIN

October 21, 1966.